STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 11, 2003
v	No. 236424 Livingston Circuit Court
CRAIG MOONEY, Defendant-Appellant.	LC No. 01-012086-FC

Before: Meter, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of two counts of first-degree criminal sexual conduct (CSC I) using a knife,[1] MCL 750.520b(1)(E), and one count of assault with a dangerous weapon, MCL 750.82. The trial court sentenced him to concurrent terms of thirteen to twenty years' imprisonment for the CSC I convictions and one to four years' imprisonment for the assault conviction. We affirm.

I. Facts

The trial occurred in March and April of 2001. Robert Abbo testified that the victim, Claudia Mooney, entered his Mobil gas station during the early morning hours of December 15, 2000, with a bruised and bloody face. Abbo testified that Mooney was shaking, seemed "very upset and scared," and asked to call the police because her husband (defendant) had "beat her up."

Mooney testified that she married defendant in 1997 and that their relationship began deteriorating when defendant lost his business in 2000. She stated that defendant was upset about losing the business, that he began using alcohol and cocaine, and that he accused her of having extramarital affairs. Mooney denied having been unfaithful during her marriage.

Mooney further testified as follows: On, December 14, 2000, she returned home from work to find defendant upset and wanting drugs. She agreed to drive him to his drug supplier

[1] The felony information charged defendant with one count of digital/vaginal penetration and one count of foreign object/vaginal penetration.

because he had been drinking alcohol and she did not want him to drive while drunk. After returning home around 9:00 p.m., she told defendant that she had an appointment the following morning to look at a new apartment for herself. Defendant then asked her to "get out," but she had nowhere to go because her family lives in Germany. She finally left and checked into a nearby motel. Defendant called her at the motel around 4:30 a.m., screamed at her, and told her that she needed to get their dogs and her possessions from the house because he was going to "blow it up."

Mooney testified that she returned to the house, put the dogs into her vehicle, and was going back inside the house to get some things when defendant pulled her coat and told her that she was not going to leave. She stated that he had a knife, that he began accusing her again of infidelity, and that he wanted her to admit to having had affairs. She stated that she wrote down some make-believe stories about affairs just to calm him down and that defendant then began punching her. According to Mooney, defendant then directed her to remove her clothes, after which he forced apart her legs and forced a dildo inside her vagina, asking her "if that's how it felt when I had sex with all those other men." She admitted that she and defendant had used the dildo for consensual sex in the past. She testified that he repeated the assault with the dildo at a later point on the night in question and also forced his hand inside of her. She denied consenting to the penetrations and stated that, because of the knife, she had no choice but to submit to them. Mooney testified that defendant kicked, pushed, and punched her and that she believed he was going to kill her. She finally departed and walked to Abbo's gas station. After returning to the house with the police, she found the house "destroyed" and discovered that a window of her vehicle had been smashed. She later filed for divorce from defendant.

On cross-examination, the defense attorney pointed out that defendant had a scratch on his shoulder in a picture apparently taken on December 15, 2002. He also pointed out that Mooney had told the police that the assault occurred with a vibrator and not a non-vibrating dildo. He also implied that (1) some of the blood produced that night was the result of Mooney's menstrual period and (2) the parties were fighting, as a result of their divorce proceedings, over how to divide their shared assets.

Officer Amy Danforth of the Green Oak Township Police Department testified that she met Mooney at Abbo's gas station on December 15, 2000. Danforth testified that Mooney was "quite beat up" and shaken and told Danforth she had been sexually assaulted. Danforth stated that Mooney had a cut on his wrist[2] but that his injury paled in comparison to Mooney's injuries.

Dr. Mark Grant, an emergency room physician, testified that he examined Mooney on December 15, 2000. According to Grant, Mooney stated that she had been sexually assaulted by her husband with a dildo. Grant found several bruises and scratches on Mooney's face, neck, and arms, as well as a bruise on her thigh. He found no lacerations or other trauma on her vagina or rectum, but he stated that this absence did not negate the possibility of a sexual assault.

[2] Mooney testified that defendant caused this cut himself by punching a glass picture frame.

Sergeant Richard Walter of the Green Oak Township Police Department testified that he went to defendant's house on the morning of December 15, 2000, and found it in disarray. He stated that defendant appeared to be under the influence of drugs or alcohol. Walter stated that he found cocaine in the residence.

Defendant testified as follows: His marriage to Mooney was deteriorating in December 2000 because she had had two extramarital affairs. When she returned home from work on December 14, 2000, he stated that he needed a ride to his vehicle, which was in another city, and that he needed to get some cocaine. He wanted to go to a motel that night, but Mooney wanted him to return home. She drove him to get cocaine. While returning from the cocaine supplier, he told her that he would be able to obtain most of the couple's assets if they were to divorce. They then stopped at his vehicle, and he was intending to get into it and go away for the weekend when Mooney persuaded him to return to their house. When they did return to the house, they began some consensual sexual activity involving the dildo, but he abruptly stopped the sexual activity. He then asked Mooney to leave, which she did.

Defendant testified that Mooney's brother telephoned from Germany between 4:00 and 5:00 a.m. Defendant became upset and called Mooney at the Best Western motel to tell her that he was going to blow up the house with himself inside it and that she should come to retrieve the dogs. He then began destroying the house, after which Mooney returned home. Defendant testified that he took a knife and told her that she would see him kill himself if she did not leave the house. He stated that Mooney tried to get the knife from him and that they then hugged each other, after which he again told her that he was going to blow up the house. He testified that Mooney subsequently tried to initiate sex with him but that he did not go through with it because he was upset. He testified that Mooney threw a jar at him, cutting his wrist, and that he hit her, pushed her, and held her down on the couch. He claimed that Mooney cut his back with the knife, after which he hit her again, dragged her out of the house, and kicked her. He stated that Mooney kept wanting to come back into the house to get her things, so he destroyed her purse and its contents, as well as some of her clothes and underwear.

Defendant presented no witnesses other than himself, and the jurors convicted defendant as charged.

II. Admission of Victim's Prior Statement

On appeal, defendant first argues that the trial court erred by admitting into evidence a prior consistent statement given by Mooney because the defense had not claimed that Mooney's testimony included a recent fabrication. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). Moreover, the erroneous admission of evidence generally does not require reversal unless, after an examination of all the evidence in the case, it affirmatively appears "that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999); see also MCL 769.26. The prosecutor in the instant case argues that defense counsel did not properly preserve this issue for appellate review and that we therefore should employ the plain error standard of review from *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). However, even assuming that defense counsel properly preserved the issue, and even assuming that the trial court erred by admitting the statement, we conclude that reversal is unwarranted. Indeed, the admission of the statement here is harmless under the standard from

Lukity, supra at 495-496. Given that (1) Officer Danforth testified that Mooney told her that defendant had subjected her to physical and sexual abuse involving nonconsensual sex with a dildo; (2) Officer Danforth testified that she reported "digital penetration" to her coworkers after meeting with Mooney; (3) Dr. Grant testified that Mooney told him about being physically assaulted and sexually assaulted with a dildo; (4) defense counsel himself elicited on cross-examination, before the admission of the written statement at issue, that Mooney had stated to the police that she had been assaulted several times; and (5) defendant does not challenge any of this testimony on appeal, it clearly does not affirmatively appear that the admission into evidence of Mooney's prior written statement would likely have affected the outcome of the case. We conclude that Mooney's in-court testimony had already been sufficiently corroborated by the testimony of Danforth and Grant and by Mooney's testimony on cross-examination. Reversal is therefore unwarranted. *Id.*

III. Prosecutorial Misconduct

Next, defendant argues that the prosecutor committed several instances of misconduct requiring reversal. We disagree.

An appellate court reviews claims of prosecutorial misconduct on a case-by-case basis. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The court examines the prosecutor's actions in context to decide if they deprived the defendant of a fair and impartial trial. See *id*. Otherwise improper remarks may not require reversal if the remarks were made in response to defense counsel's arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Moreover, if a defendant did not object to alleged prosecutorial misconduct below, this Court reviews for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To obtain relief under the plain error doctrine, a defendant must demonstrate the existence of a clear or obvious error that likely affected the outcome of the case. *Id.; People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even if a defendant satisfies this initial burden, reversal is appropriate only if the plain error resulted in the conviction of an actually innocent person or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763; *Schutte, supra* at 720. Moreover, "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Schutte, supra* at 721.

A. Elicitation of Evidence

Defendant argues that the prosecutor committed error requiring reversal by eliciting inadmissible evidence in three separate instances. He first contends that the prosecutor "invited error by offering specious reasons for admission of the complainant's written statement." This argument is unpreserved because defendant did not object to the admission of this statement below on the basis of prosecutorial misconduct. Accordingly, we review for plain error. *Schutte, supra* at 720. We find no basis for reversal because, as noted above, the admission of the statement did not likely affect the outcome of the case. *Carines, supra* at 763; *Lukity, supra* at 495-496. Moreover, we conclude that the prosecutor acted in good faith by offering the statement into evidence, and prosecutorial misconduct cannot be premised on a prosecutor's good-faith effort to admit evidence if the attempt did not prejudice the defendant. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). As noted above, the statement at issue did not in fact prejudice defendant.

Second, defendant contends that the prosecutor erred by asking a police officer, on redirect examination, to reiterate that he had been in the Mooney's house before and to explain why he had been there previously. Although defendant did object to this line of questioning, we cannot agree that the questioning requires reversal, for several reasons. First, the officer initially indicated that he had been in the house on a prior occasion while being questioned by defense counsel, and counsel did not object at that time to the officer's statement. Second, the officer, during redirect, never indicated why he had been at the house previously because his answer was cut off by defense counsel's objection. Third, the trial court gave a clear curative instruction, stating that "[t]he fact that the Sergeant may have been at the home previously is immaterial to this lawsuit and don't speculate on why." Finally, the court instructed the jurors that "[t]he questions that the lawyers ask the witnesses are not themselves evidence." Under all these circumstances, we cannot conclude that the prosecutor's questioning denied the defendant a fair and impartial trial. *McElhaney*, *supra* at 283. Reversal is unwarranted.

Defendant thirdly contends that the prosecutor erred by eliciting that defendant was incarcerated as a result of the criminal allegations against him. Defendant did not object to the prosecutor's questioning in this regard, and plain error review is therefore appropriate. *Schutte*, *supra* at 720. We find no plain error because defendant himself first elicited that he had been incarcerated pending investigation of the instant crimes. The prosecutor did nothing more than reiterate something to which defendant had already testified. The prosecutor's elicitation did not affect the outcome of the case, see *Carines*, *supra* at 763, and reversal is again unwarranted.

B. Misstatements of Fact

Defendant next argues that the prosecutor misstated facts five different times in her cross-examination of defendant. He first contends that the prosecutor improperly stated that Mooney's menstrual period had ended on the night of the assaults. We find no error requiring reversal with respect to this statement because Mooney testified on cross-examination that she had "pretty much come to the end of [her] . . . menstruation period" and did not need to use a tampon. The prosecutor's statement conformed to Mooney's testimony. At any rate, we cannot conclude that the statement by the prosecutor with respect to this issue denied defendant a fair trial, given that defendant replied to the prosecutor that Mooney had not in fact finished her menstrual period on the night in question and given Dr. Grant's testimony that Mooney was experiencing the last stages of her menstrual period when he examined her.

Second, defendant contends that the prosecutor improperly challenged defendant's testimony on cross-examination that he knew about two affairs Mooney had had – one he learned of after the first year the couple was married and one he learned of two weeks before the instant assaults. When defendant gave this testimony, the prosecutor stated, "[t]hat wasn't your testimony before . . . ." We discern no basis for reversal with respect to the prosecutor's statement. First, defendant objected to the prosecutor's statement, after which she *withdrew it*. Second, the prosecutor's statement was, in actuality, accurate. Defendant stated on cross-examination, "I said the first [affair] I knew about after the first year we were married. The second one I just found out about two weeks prior." However, defendant had *not* in fact testified on direct examination that he knew about the first affair "after the first year we were married." Instead, he simply testified that "[m]y wife had an affair that I had known about," without specifying when he learned of it. No prosecutorial misconduct is apparent.

Third, defendant contends that the prosecutor improperly indicated that he had given two explanations for the cut on his wrist. The prosecutor implied that defendant had stated (1) that the cut resulted from Mooney's throwing a glass at him and (2) that the cut occurred when Mooney pulled the knife away from defendant's throat while he was threatening to commit suicide. We agree that the prosecutor erred with respect to this issue, because defendant had not in fact testified that the cut on his wrist resulted from a struggle with the knife. However, we cannot agree that the error requires reversal, because defense counsel objected to the prosecutor's statement, and the court sustained the objection. Defendant then reiterated that the cut resulted from the glass thrown by Mooney. Under the circumstances, the brief misstatement of fact did not affect the outcome of the case or deprive defendant of a fair trial. See *McElhaney, supra* at 283.

Fourth, defendant contends that the prosecutor erred by implying that defendant had given two different time frames in stating when the cut on his back occurred. On direct examination, defendant testified that after he pushed Mooney back onto the couch and held her down, he went toward the kitchen for a towel, at which point Mooney swiped him with the knife and cut his back. On cross-examination, the prosecutor implied that defendant had at one point changed his sequence of events and testified that Mooney inflicted the cut on his back at a later time, after he had attempted to drag Mooney out of the house. We agree once again that the prosecutor erred with respect to this issue. Defendant did not in fact testify that Mooney cut him with the knife after he attempted to drag her out of the house. Again, however, we cannot agree that the error requires reversal. Indeed, defendant did not object to the prosecutor's misstatement, and we cannot agree that the brief misstatement affected the outcome of the case under the standard from *Carines, supra* at 763. Moreover, defendant immediately corrected the prosecutor and reiterated the sequence of events he had recited on direct examination. Under the circumstances, defendant was not denied a fair and impartial trial. See *McElhaney, supra* at 283.

Fifth, defendant contends that the prosecutor misstated the facts in evidence by indicating that, in x-raying defendant's wrist, the doctors treating him were looking for fractures and not for glass. Defendant contends that the prosecutor had no basis from which to conclude that the doctors were not looking for glass. However, the prosecutor referred to the medical report, which apparently mentioned an absence of fractures and did not mention that an exploration for glass fragments had taken place. Accordingly, the prosecutor's statement was a reasonable inference from the information available to her. At any rate, defendant did not object to the prosecutor's statement, and we cannot conclude that this brief statement on a peripheral issue affected the outcome of the case.[3] *Carines, supra* at 763.

C. Sarcasm

[3] Mooney testified that the cut on defendant's wrist occurred when he smashed a glass picture frame. Therefore, the possible presence of glass in defendant's wrist was immaterial to the outcome of the case – both sides agreed that the cut resulted from some type of glass (either a picture frame or a drinking glass).

Next, defendant argues that the prosecutor improperly used sarcasm in cross-examining defendant. Defendant, however, failed to object to the instances of sarcasm he identifies on appeal.[4] Accordingly, we review for plain error. *Schutte, supra* at 720. We discern no clear or obvious error, see *Carines, supra* at 763, because the prosecutor was engaging in proper cross-examination and merely emphasizing that defendant seemed to have a ready answer for anything asked of him. Moreover, defendant has cited no authority indicating that a prosecutor may not use sarcasm in cross-examining a witness. See *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (an appellant may not leave it up to this Court to search for authority to sustain his position). Also, a prosecutor is not required to make her points using the blandest possible terms. See, generally, *Schutte, supra* at 722. Reversal is unwarranted.

D. Closing and Rebuttal Arguments.

Next, defendant argues that the prosecutor erred in numerous respects during her closing and rebuttal arguments. Defendant failed to object to any of these alleged instances of misconduct, so we will review for plain error. *Schutte, supra* at 720. We find no clear or obvious errors that affected the outcome of the case. *Carines, supra* at 763. Defendant contends that the prosecutor improperly used Mooney's prior statement to reinforce her credibility. We disagree. Indeed, the trial court admitted the statement after the prosecutor made a good-faith effort to have it admitted. The prosecutor did not clearly err by mentioning a document that had been admitted into evidence by the trial court.[5] Defendant also contends that the prosecutor (1) used the authority of her office to improperly refer to defendant as a liar and to improperly vouch for Mooney's credibility and (2) improperly urged the jurors to convict defendant based on a sense of civic duty. We conclude that defendant has waived these arguments on appeal because, contrary to the requirements of MCR 7.212(C)(7), he has failed to specify the transcript pages on which the alleged errors occurred. Accordingly, we cannot determine the comments he finds objectionable and under which legal precepts he premises his specific objections. This Court does not entertain issues that have been inadequately briefed. See, generally, *Watson, supra* at 587. At any rate, our review of the record demonstrates that prosecutor properly argued that, in light of the evidence introduced at trial, Mooney's version of the events was more credible than defendant's. The prosecutor was allowed to make such an argument, and she was not required to use the blandest possible terms. *Schutte, supra* at 722. Moreover, to the extent any errors did occur, they could have been cured with a proper curative instruction. *Id.* at 721.

[4] In challenging the prosecutor's use of sarcasm, defendant makes a vague reference to additional instances of prosecutorial misconduct but does not cite transcript pages in support. We do not consider these additional instances of alleged misconduct because of the inadequate briefing, see *Watson, supra* at 587, and the violation of MCR 7.212(C)(7) (requiring that specific transcript pages, if pertinent, be cited on appeal).

[5] Moreover, the portion of the prosecutor's argument cited by defendant in his briefing of this issue does not, contrary to his contention, emphasize that Mooney was consistent in her statements; instead, it reminds the jury that Mooney accused defendant of the charged crimes immediately after they occurred. Officer Danforth also testified about an immediate accusation.

Defendant also contends that the prosecutor wrongly stated that defendant cut up "hundreds" of Mooney's underpants in a fit of anger and that he "cut" a pair off her body, when in actuality defendant testified that he cut up only a "sizeable pile" of underpants, and Mooney testified that he ripped (as opposed to cut) a pair off her body. We discern no clear or obvious error with respect to these statements, since they *largely* conformed to the evidence introduced at trial. To the extent the prosecutor used improper terminology, we cannot conclude that the brief, substituted terms affected the outcome of the case, *Carines, supra* at 763, and any error could have been cured with a proper curative instruction. *Schutte, supra* at 721.

Defendant also contends that the prosecutor improperly stated that defendant had consumed a "ton" of cocaine on the evening in question, when defendant testified only that he had consumed "three lines," or a "[q]uarter gram," of cocaine. Once again, any error in this regard could have been cured with a proper curative instruction. *Id.* Moreover, the context makes clear that the prosecutor was not referring to an actual ton, i.e., two thousand pounds, of cocaine. She was conveying the fact that defendant had consumed a large quantity of cocaine, and to a non-drug-user, three lines of cocaine may very well be considered a large quantity. No clear or obvious error is apparent, and the prosecutor's remarks did not affect the outcome of the case. *Carines, supra* at 763.

Finally, defendant contends that the prosecutor erred by stating that it would be far worse for defendant to go free after assaulting Mooney than it would be for him to be falsely accused. Once again, any prejudice resulting from this statement could have been cured by a proper curative instruction. *Schutte, supra* at 721. Moreover, although we do not dispute that the challenged statement, viewed in isolation, would be deemed improper, otherwise objectionable comments do not require reversal if they are made in response to defense arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Here, defense counsel stated that it would be worse to be falsely accused of sexual assault than to be the victim of a sexual assault. The prosecutor then agreed that "falsely accusing someone would be a very serious situation," pointed out that no evidence of a false accusation existed in the instant case, and stated that defendant's going free after committing the assault would be a travesty. The comments did not urge the jurors to convict an innocent person but merely (1) responded to defense counsel's argument and (2) emphasized that defendant was indeed guilty of the assaults. No clear or obvious error is apparent, and the comments did not likely affect the outcome of the case, especially because the trial court properly instructed the jury with respect to the burden of proof. *Carines, supra* at 763. Reversal is unwarranted.

IV. Ineffective Assistance of Counsel

Next, defendant argues that his trial attorney rendered ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel's error or errors, it is reasonably probable that the outcome of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.* at 302.

A. Fee Structure

Defendant first contends that the fee structure under which defense counsel worked automatically caused ineffective assistance in this case.[6] We disagree that this issue merits reversal. First, the case law defendant cites does not demonstrate that such a fee structure is automatically deficient in a non-capital case. As noted, an appellant must not leave it up to this Court to search for authority to sustain or reject a position. *Watson, supra* at 587. Second, Gatesman testified that he receives around six hundred dollars for *every* assigned case, regardless of whether the case ends in a plea agreement and involves little work. It is eminently reasonable to assume that the cases demanding little work "balance out" the cases demanding more. Finally, our review of the transcripts demonstrates that Gatesman vigorously cross-examined the prosecution witnesses and argued defendant's case; no instance of actual ineffective assistance of counsel is apparent to us.

B. Counsel's Preparation for Trial

Defendant also contends that Gatesman inadequately prepared for trial. We once again disagree that this issue merits reversal. Indeed, we cannot conclude that the actions defendant argues should have been taken by Gatesman would have affected the outcome of the trial. *Toma, supra* at 302-303. Indeed, testing to see whether the knife had defendant's blood on it would have yielded little useful information, given that defendant *admittedly* had a cut on his wrist that could have caused his blood to get on the knife. Nor would testing the knife for Mooney's fingerprints have been useful, given that Mooney shared the house and obviously had access to the kitchen implements. Moreover, the evidence of sexually-explicit magazines at the home of defendant and Mooney would not, contrary to defendant's argument on appeal, have demonstrated that Mooney voluntarily bought a sexually-explicit magazine and alcohol on the night of the assaults. Defendant also mentions emails in which Mooney discusses having sex with another woman. Defendant states, "[t]he emails explain why the dildo in evidence was two ended, and could have been viewed by the jury as corroborative of Defendant's claim that it would not have been unusual for the complainant to use it herself that night . . . ." However, Mooney *admitted* that she sometimes voluntarily used the dildo; using the emails in the way defendant suggests (even assuming that they would have been admissible at trial) would not have contributed to defendant's defense. Defendant additionally argues that counsel should have introduced evidence that Mooney had made numerous automatic teller machine (ATM) withdrawals from her bank account en route to a drug supplier; he contends that this evidence would have corroborated his testimony that Mooney used drugs. We disagree that counsel erred with respect to the introduction of this evidence. Indeed, we fail to see how this evidence would have affected the outcome of the trial. People commonly make ATM withdrawals for reasons other than to purchase illegal drugs.

C. Failure to Call Witnesses

[6] At the evidentiary hearing below dealing with defendant's ineffective assistance of counsel claims, defense counsel, Mark Gatesman, testified that the court pays him around six hundred dollars for each case he is assigned, regardless of the actual amount of time he spends on the case.

Defendant next contends that Gatesman unreasonably failed to call defendant's parents as witnesses. He argues that his mother would have testified that (1) Mooney admitted to her that she had had an extramarital affair (thus contradicting Mooney's testimony at trial), (2) Mooney normally drank vodka, while defendant drank whiskey (thus implying that the vodka from the partially-empty bottle of vodka discovered at the scene of the assaults had been consumed by Mooney and not defendant), and (3) defendant had a four-inch slash on his back, as well as a puncture wound on his arm, the day after his arrest (thus corroborating defendant's testimony that Mooney harmed him on the night in question). Defendant argues that his father would have testified that (1) Mooney normally drank vodka, and she told him she had been drinking alcohol on the night in question (thus contradicting Mooney's testimony that she did not drink that night) and (2) he saw a broken glass in the house after the assaults (thus corroborating defendant's testimony that the cut on his wrist occurred when Mooney threw a glass at him).

Counsel testified at the evidentiary hearing that he did not call defendant's parents at trial because he believed that their testimony would not be relevant and because "the jury would not have believed what they said based on their relationship with [defendant]. They would have come across as self-serving." He also stated that he did not want to introduce evidence of the broken glass because it could have implied that Mooney threw the glass defensively. We note that "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id.* at 76-77. That a particular strategy failed does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Counsel made reasonable choices, and we will not assess his competence with the benefit of hindsight. Moreover, "[i]neffective assistance of counsel can take the form of failure to call witnesses only if the failure deprives the defendant of a substantial defense." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grds 453 Mich 902 (1996). "A defense is substantial if it might have made a difference in the outcome of the trial." *Id.* We do not believe that the failure to call defendant's parents as witnesses deprived defendant of a substantial defense.

D. Failure to Object

Defendant contends that Gatesman unreasonably failed to object to instances of prosecutorial misconduct. However, as noted in part III of this opinion, the various instances of alleged prosecutorial misconduct either (1) did not, in actuality, constitute misconduct or (2) did not affect the outcome of the trial. Accordingly, defendant did not receive ineffective assistance of counsel under the standard from *Toma, supra* at 302-303.

Defendant also contends that Gatesman should have objected to Dr. Grant's reading of Mooney's medical records and commenting on various photographs. We disagree that this contention merits reversal. First, defendant cites no case law indicating that Dr. Grant acted improperly. An appellant may not leave it up to this Court to search for authority to sustain his position. *Watson, supra* at 587. Second, the medical records were *admitted into evidence*, and therefore Dr. Grant's testimony was largely cumulative; the failure to object did not affect the outcome of the trial. *Toma, supra* at 303.

E. Concession of Guilt

Finally defendant contends that Gatesman erred by stating the following in closing arguments:

> One of the charges is an Assault with a Dangerous Weapon. And maybe it is reasonable for you to believe, at some point, when the knife's being used in the manner that [defendant] described for you, that at some point, she believed that knife was trying to be used on her and that she was in fear. That might be reasonable based on all the evidence that you've heard in this case. But when you look at the jury form and it gives you the choice regarding the two sexual, Criminal Sexual Conduct cases that's where your difficult decision really comes up.

Defendant contends that this argument amounted to a concession of guilt on the charge of assault with a dangerous weapon and that he did not consent to such a concession. While a defense attorney can legitimately employ the accepted trial strategy of admitting guilt to a lesser offense, see *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994), a concession of guilt cannot be made without the defendant's consent. *Wiley v Sowders*, 647 F 2d 642, 649 (CA 6, 1981). Here, however, contrary to defendant's contention on appeal, counsel did not concede guilt. Counsel used the term "might" and failed to discuss an essential element of assault with a dangerous weapon – that defendant intended to injury Mooney or to place her in fear of an immediate battery. See *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999) (discussing elements of assault). Defendant's argument is without merit.

V. Replaying of Testimony

Next, defendant argues that the trial court erred by replaying Mooney's videotaped testimony for the jury in response to their request. Defendant contends that the trial court should instead have had the reporter read back the requested testimony. We review this issue for an abuse of discretion. See, generally, *People v Howe*, 392 Mich 670, 675-676; 221 NW2d 350 (1974); MCR 6.414(H). Defendant cites several out-of-state and federal cases in arguing that a playback of videotaped testimony is inappropriate. However, he cites no *binding* case law – i.e., Michigan case law – that requires us to flatly reject the playback of videotaped testimony in the instant case. The matter was assigned to the sound discretion of the trial court, and the court exercised this discretion by (1) first directing the jurors to use their collective memory in recalling Mooney's testimony and (2) ensuring that the jury also heard defense counsel's cross-examination of Mooney. As noted in *Howe*, a court "cannot simply refuse to grant the jury's request for fear of placing too much emphasis on the testimony of one or two witnesses." We simply cannot conclude that the trial court *abused its discretion* by allowing the playback of the testimony.

VI. Newly-Discovered Evidence

Finally, defendant argues that the trial court should have granted him a new trial based on newly-discovered evidence. To obtain relief with respect to this issue, defendant must demonstrate that:

> (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) including the new evidence upon retrial would probably cause a different result; and (4) the party could not, using reasonable diligence, have discovered and produced the evidence at trial. [*People v Bradshaw*, 165 Mich App 562, 567; 419 NW2d 33 (1988).]

Defendant cites the affidavit of Michael York, in which York states that (1) he had an extramarital affair with Mooney beginning in October 2000; (2) Mooney told him that she had had another extramarital affair before October 2000; and (3)Mooney told him that, on the night in question, "she and [defendant] engaged in consensual sex before they fought, and . . . after that consensual sex they argued, and he hit her and pulled a knife on her." The trial court rejected defendant's argument concerning York's potential testimony as untimely[7] and also stated that York's affidavit dealt with "collateral testimony."

On appeal, defendant argues that York's testimony would be admissible for impeachment under MRE 613(b) as prior inconsistent statements. MRE 613(b) states, in part:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

However, as noted in *People v Sutherland*, 149 Mich App 161, 165; NW2d (1985), "[e]xtrinsic evidence may not be used to impeach a witness on a collateral matter." The issue of whether Mooney had had extramarital affairs was clearly a collateral matter in this case, and therefore York's testimony about the affairs would not have been admissible at trial under *Sutherland*. Defendant counters by stating that because the prosecutor introduced Mooney's unequivocal testimony that she had had no extramarital affairs, defendant would be able to admit York's testimony about the affairs under the "sweeping denial" doctrine. See *United States v Markarian*, 967 F2d 1098, 1102-1103 (CA 6, 1992). However, even assuming that this "sweeping denial" doctrine is applicable under Michigan, as opposed to federal, law,[8] relief is nonetheless unwarranted. As clearly stated in *People v Stricklin*, 162 Mich App 623, 632; NW2d (1987), "newly discovered evidence is not grounds for a new trial where it would be used merely for impeachment purposes." See also *Bradshaw, supra* at 567. This rule from *Stricklin* and *Bradshaw* applies equally to York's statement about the sequence of events on the night in question. Indeed, defendant indicates in his appellate brief that the statement would be admissible for *impeachment* purposes and not as substantive evidence. See also *People v Kohler*, 113 Mich App 594, 599, 318 NW2d 481 (1981). Accordingly, a new trial is unwarranted. *Stricklin, supra* at 632; *Bradshaw, supra* at 567.

[7] Defendant made the newly-discovered evidence argument after having already filed his original motion for a new trial.

[8] Defendant cites no Michigan law in support of the doctrine.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Stephen L. Borrello